United States Court of Appeals for the Second Circuit



APPELLANT'S REPLY BRIEF

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NEWBURGER, LOEB & CO., INC. as Assignee of Claims of David Buckley and Mary Buckley,

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APR 1 8 1977

Plaintiff-Appel :- Cross-Appellees,

against

CHARLES GROSS, MABEL BLEICH, GROSS & CO., and JEANNE DONOGHUE,

Defendants-Appellees-Cross-Appellants,

and

NEWBURGER, LOEB & CO., a New York Limited Partnership,
ANDREW M. NEWBURGER, ROBERT L. NEWBURGER, RICHARD D.
STERN, as Executors of the Estate of Leo Stern, ROBERT
L. STERN, RICHARD D. STERN, JOHN F. SETTEL, HAROLD J.
RICHARDS, SANFORD ROGGENBURG, HARRY B. FRANK and JEROME
TARNOFF, as Executors of the Estate of Ned D. Frank, FRED
KAYNE, ROBERT MUH, PAUL RISHER, CHARLES SLOANE, ROBERT
S. PERSKY, FINLEY, KUMBLE, WAGNER, HEINE, UNDERBERG &
GRUTMAN, a Partnership, (formerly known as Finley, Kumble,
Underberg, Persky & Roth and Finley, Kumble, Heine,
Underberg & Grutman) and LAWRENCE J. BERKOWITZ,

Additional Defendants on Counter of Appellants-Cross-Appellees.

Appeal from a Judgment of the United State
District Court for the Southern District of New

REPLY AND ANSWERING BRIEF OF APPELLANT FINLEY, KUMBLE, WAGNER, HEINE, UNDERBERG & GRUTMAN

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NEWBURGER, LOEB & CO., INC. as Assignee of Claims of David Buckley and Mary Buckley,

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Additional Defendants on Counterclaims-Appellants-Cross-Appellees.

Appeal from a Judgment of the United States
District Court for the Southern District of New York

REPLY AND ANSWERING BRIEF OF APPELLANT FINLEY, KUMBLE, WAGNER, HEINE, UNDERBERG & GRUTMAN

Preliminary Statement

The Gross faction contends that the briefs of Finley, Kumble and the other appellants "base themselves in large part upon versions of the facts inconsistent with Judge Owen's findings, and not supported by the record" (Gross Br. 4).* Yet this is precisely what the Gross faction's brief does. Moreover, the Gross faction compounds this error by ascribing to the District Court legal and factual findings which nowhere appear in the opinion. For example:

One of the Gross faction's principal arguments is that the District Court based its finding of liability on the fact that Finley, Kumble and the other counterclaim defendants had engaged in a "conspiracy to breach their fiduciary duties" to the Gross faction. The District Court never made such a finding. It expressly held that the "conspiracy" allegedly involved in this case was a "conspiracy to injure" the Gross faction -- not a conspiracy to breach fiduciary duties. See the discussion at pp. 16-20, infra.

Another example: The Gross faction asserts that one of the wrongful acts committed by the counterclaim defendants

^{*} Parenthetical references preceded by "Gross Br." are to pages in the answering brief submitted by the Gross faction.

was the "defamation" of Gross. This "defamation" argument runs throughout the Gross faction's brief and, indeed, is virtually the sole basis upon which the Gross faction seeks to justify the District Court's award of punitive damages. Nowhere in the District Court's opinion is there a finding that Gross was defamed; nor did the Gross faction ever plead or prove the elements of the tort of defamation. See the discussion at pp. 45-46, infra.

Similarly, the Gross faction's lengthy discussion of "The Facts" (Gross Br. 7-46) is largely a selective and imaginative reading of the record without reference to the opinion below. Most of these "facts" were never found by the District Court.

By ascribing to the District Court factual and legal findings which were never made, the Gross faction avoids the legal issues that actually controlled the result below. Consequently, we shall not engage in a lengthy rebuttal of the Gross faction's "factual" presentation. It is the opinion, findings and judgment of the District Court that govern here. We submit that the District Court made serious errors concerning all phases of the case below -- jurisdiction, liability and damages. The Gross faction's brief provides no basis for permitting those errors to stand uncorrected on appeal.

JURISDICTION WAS ERRONEOUSLY EXERCISED BELOW

A. There is no Ancillary Jurisdiction Over the Counterclaims

We have argued that the state law counterclaims sustained below were not compulsory and thus not within the District Court's ancillary jurisdiction. The criteria for determining whether a counterclaim is compulsory under Rule 13(a) are set forth in <u>Pipeliners Local 798 v. Ellerd</u>, 503 F.2d 1193, 1198 (10th Cir. 1974). None is present here.

First, the issues of fact and law raised by the complaint differed completely from those raised by the counterclaims. The complaint's churning claim concerned transactions in the Buckleys' brokerage accounts at Gross & Co. in 1962-66, and had nothing to do with the Newburger, Loeb reorganization or Finley, Kumble. The counterclaims concerned the reorganization of Newburger, Loeb in 1970-71, and had nothing to do with the Buckleys or Gross & Co.

Second, resolution of the complaint would not be res judicata of the counterclaims.

Third, there was no evidence common to the federal claim and the counterclaims. The trial below was essentially two trials, one of the churning claim and the other of the Gross faction's counterclaims. None of the testimonial or documentary evidence overlapped.

Finally, there was no logical connection between the complaint and the counterclaims.

The Gross faction does not challenge these standards. At the same time, it makes no attempt to show that the standards are met or to rebut our detailed analysis (FK Br.* 23-26) showing they are not met. This silence about the temporal, evidentiary, res judicata, factual and legal relationship between the issues in the complaint and those in the counterclaims is, we submit, more eloquent than all the verbiage which the Gross faction has devoted to the jurisdictional question.

The thrust of the Gross faction's argument on jurisdiction is that plaintiff (the "Corporation"), by alleging that the churning claim was assigned to it, compelled counterclaims relating to the transaction in which the churning claim was assigned (Gross Br. 90-93). The argument is unsupportable. Under the language of Rule 13(a), Fed. R. Civ. P., a counterclaim is compulsory only "if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim." (Emphasis added.) The "subject matter" of the Corporation's claim was churning in the Buckleys' accounts; undisputedly, the counterclaims had nothing to do with that subject matter. Assignment of the cause of action to the Corporation, even if viewed as a necessary prerequisite

^{*} Parenthetical references preceded by "FK Br." are to pages in the main appellate brief submitted by Finley, Kumble.

to the bringing of the claim, was not the subject matter of the claim.

The assignment was totally peripheral to the subject matter of the Corporation's claim. It was also totally peripheral to the subject matter of the counterclaims. Under the language of Rule 13(a), this tangential link is not a sufficient nexus between otherwise unrelated claims and counterclaims.

Moreover, the Corporation's ritualistic, one-sentence reference to the assignment could not possibly raise the host of factual and legal matters underlying the Gross faction's counterclaims -- matters which took the Gross faction 24 pages to plead and many weeks to try. The fact of the assignment was not in dispute. The validity of the assignment was not something that the Corporation was called upon to prove or made any effort to prove. The assignment received virtually no attention in the Corporation's pleading or proof.

It was the <u>Gross faction</u> which focused on what it alleged to be the invalidity of the assignment as a defense to the churning claim. There is a substantial question as to whether the invalidity of the assignment <u>could be</u> a defense to the churning claim. The District Court decided the churning claim on the merits, even though it held the transfer invalid.

In any case, the Gross faction's jurisdictional argument reduces to the contention that the relationship between this defense and its counterclaims is a sufficient basis for

jurisdiction. This argument, anticipated in our main brief (pp. 27-29), is not supported by the cases or the language of Rule 13(a).

In making this argument, the Gross faction relies primarily on Moore v. New York Cotton Exchange, 270 U.S. 593 (1926). Yet, neither that case nor any other case cited by the Gross faction has anything to do with the relationship between a counterclaim and a defense.

In <u>Moore</u>, plaintiff alleged that the defendant wrongfully refused to supply him with its quotation service. Defendant's counterclaim alleged that plaintiff was purloining the quotations and sought an injunction. In ruling that the counterclaim was compulsory, the Court observed that the subject matter of plaintiff's <u>claim</u> — the refusal to furnish the quotations — "is an important part of the transaction constituting the subject matter of the counterclaim." 270 U.S. at 610. Moreover, the Court found that the connection between the two claims was so close that a determination of plaintiff's claim would essentially determine the counterclaim, and the relief requested in the counterclaim merely made complete the relief afforded by dismissing plaintiff's claim. Id.

No clearer case of simple judicial economy could be cited. The allegations of the complaint and counterclaim in Moore make clear that the issues and evidence on the two claims, which necessarily involved the same time period and parties, would substantially overlap.

The Gross faction's reliance on Great Lakes Rubber

Corp. v. Herbert Cooper Co., 286 F.2d 631 (3d Cir. 1961) is

equally unavailing. Both the counterclaim and claim in that

case involved charges and countercharges of unfair competition

in the same time period. Indeed, in the dictum from that case

quoted by the Gross faction, the Court observed that a key

factor is whether the claim and counterclaim "involve many of

the same factual issues, or the same factual and legal issues."

286 F.2d at 634. As we have shown, the factual and legal

issues involved in the churning claim and the counterclaims

were totally disparate.

Similarly, in <u>United Artists</u> v. <u>Masterpiece Productions</u>, 221 F.2d 213 (2d Cir. 1955), the subject matter of both the claim and counterclaim was television rights over certain motion pictures — with both the plaintiff and defendant charging the other with unfair trade practices. The question before the Court was which party was competing unfairly in an ongoing, contemporaneous course of conduct. <u>United Artists</u> would be relevant here only if the subject matter of both the complaint and counterclaims concerned churning the Buckleys' brokerage accounts.

But the counterclaims were not related to the churning claim. They concerned a totally different subject matter. Consequently, they should have been dismissed for lack of jurisdiction.*

B. There is no Pendent Jurisdiction over the Counterclaims

Buried in the voluminous pleadings in this case is a final counterclaim -- the ninth -- purporting to assert a violation of the federal antitrust laws. The gist of the claim is that Gross's erstwhile partners denied him an "employment opportunity" by enforcing an unleasonable covenant not to compete. So devoid of substance is this counterclaim that

The Gross faction has misconstrued our rebuttal by contending that whether or not a counterclaim is "premature" is an issue which goes to the merits, not to jurisdiction (Gross Br. 96). This misses the point. The point is that the assertion of an improper motive in instituting a lawsuit cannot provide the connection necessary to make a counterclaim compulsory. The authority supporting this point is clear. See 6 Wright & Miller Federal Practice and Procedure: Civil § 1411 at 56 (1969), and cases cited thereunder.

The cases cited by the Gross faction on this point are inapposite. In each case cited (Gross Br. 97-98), counterclaims were held compulsory on a basis wholly independent of any allegations in the nature of malicious prosecution or wrongful motive in instituting the action. It is not disputed that such allegations cannot provide the connection necessary to make a counterclaim compulsory.

^{*} Our main brief anticipated a further jurisdictional argument: that the counterclaims were compulsory because they alleged the very assertion of the churning claim to be tortious. In rebuttal to this anticipated argument, we cited authorities holding that the assertion of wrongful conduct or improper motive in instituting the main action is never treated as a compulsory counterclaim to the allegedly wrongfully instituted action (FK Br. 26-27).

Gross himself admits damages have never been awarded on similar facts (Gross Br. 125, 129), and the District Court dismissed it in a footnote (534).*

Nevertheless, Gross would make this ninth counterclaim the federal tail that wags the state law dog. He argues
that even if the state law counterclaims sustained below -the first, second and fourth -- were permissive, they were
pendent to the antitrust counterclaim and therefore within the
jurisdiction of the federal courts.

This is not a proper case for the exercise of pendent jurisdiction. The governing standards, enunciated by the Supreme Court in <u>United Mine Workers</u> v. <u>Gibbs</u>, 383 U.S. 715 (1966), have not been met.

First, the Supreme Court held that, if pendent juris-diction is to be exercised, "[t]he state and federal claims must derive from a common nucleus of operative fact."

Id. at 725.

No such link can be established here. The "operative facts" underlying the antitrust counterclaim were that a prospective employer of Gross requested his "clearance" from the Partnership and that the Partnership advised the prospective employer that Gross was subject to a restrictive covenant contained in the Partnership Agreement (E852-853). The

^{*} The merits of the antitrust counterclaim are discussed in Point V, infra.

"operative facts" underlying the state counterclaims were the transfer of assets of the Partnership to the Corporation and the Gross faction's opposition to that transfer. The facts underlying the antitrust counterclaim were thus totally separate from the facts of the state counterclaims. Consequently, the District Court did not have the power to assume pendent jurisdiction over the state counterclaims. See, e.g., Petersen v. Federated Dev. Co., 387 F. Supp. 355, 360 (S.D.N.Y. 1974);

Stravides v. Mellon Nat'l Bank & Trust Co., 353 F. Supp. 1072, 1080-82 (W.D. Pa.), aff'd, 487 F.2d 953 (3d Cir. 1973) (per curiam); Weiss v. Sunasco Inc., 295 F. Supp. 824, 828 (S.D.N.Y. 1969).

Second, the Supreme Court stated in <u>United Mine Workers</u> that pendent jurisdiction is not appropriate where "state issues substantially predominate, whether in terms of proof, of the scope of the issues raised, or of the comprehensiveness of the remedy sought. . . . " 383 U.S. at 726.

Here, the state issues raised by the Gross faction's first, second and fourth counterclaims overwhelmed the sparse federal issues raised by the antitrust counterclaim. As elaborated above, the facts relevant to the antitrust claim were simple. The sole issues raised by these facts were (a) the threshold issue of whether a party subject to a restrictive covenant can ever recover damages for enforcement of such a covenant and (b) whether this particular covenant was

unreasonable in scope and had any anticompetitive impact within the meaning of the antitrust laws. By contrast, the issues on the state law counterclaims were many and complex and dominated the proceedings below. They included whether the New York Partnership Law had been violated, whether various counterclaim defendants could be liable for a civil conspiracy, whether any torts under state law had been committed and whether attorneys could be held liable for the acts of their clients.

The proof on the state law counterclaims also overwhelmingly predominated at trial. In a seven-week trial, only a few witnesses gave any testimony relating to the federal counterclaim, and that testimony was brief. Similarly, of the hundreds of exhibits, only four or five had anything to do with this federal claim.

Under such circumstances, particularly where there were predominant and novel state law issues, it would have been inappropriate to exercise pendent jurisdiction. Moor v. County of Alameda, 411 U.S. 693 (1973); Pride v. Community School Board of Brooklyn, N.Y. School District #18, 482 F.2d 257 (2d Cir. 1973).

Additionally, a threshold questice as to the availability of pendent jurisdiction is whether there is a "substantial federal claim for relief" to which state claims can be appended. Tully v. Mott Supermarkets, Inc., 540 F.2d

187, 196 (3d Cir. 1976). Gross's federal counterclaim is not a "substantial federal claim". The federal crititrust laws have never been used to support the type of claim he makes. Given the flimsy nature of the federal counterclaim, it is not sufficient to support any pendent state claims. See Kavit v.

A. L. Stamm & Co., 491 F.2d 1176, 1179 (2d Cir. 1974). See the discussion at pp. 52-55, infra.

The District Court did not utilize the theory of pendent jurisdiction. On the contrary, it dismissed several of the counterclaims for lack of jurisdiction notwithstanding the allegation of the pendent jurisdiction theory (514; 365 F. Supp. at 1367). One of the dismissed counterclaims was a state claim (the eighth counterclaim) which alleged the same facts as the federal antitrust claim. Surely, if there was no pendent jurisdiction over that state claim, which did present some of the same issues underlying the federal antitrust counterclaim, there necessarily could be no pendent jurisdiction over the first, second and fourth counterclaims, which had none of the same factual or legal issues as the federal counterclaim.

In fact, the Gross faction has cited no case in which the pendent jurisdiction doctrine has been used to append claims to a permissive federal counterclaim*; the Gross

^{*} Since the eighth counterclaim, which alleged the same facts as the federal counterclaim, was held to be only "permissive," clearly the federal claim was also merely a "permissive" counterclaim.

faction simply assumes that the doctrine is available under such circumstances. The only authority on this point is to the contrary. In <u>Beach</u> v. <u>KDI Corp.</u>, 490 F.2d 1312, 1200 (3d Cir. 1974) the Court clearly stated:

"Pendent jurisdiction, in the sense of judicial power, exists as to a plaintiff's state claim which lacks independent basis of jurisdiction, when it is joined with a federal claim, provided, however, that the state and fed. al claims 'derive from a common nucleus of operative fact.'

"Here, the district court disregarded the fact that the pendent jurisdiction doctrine pertains only to a state claim of a plaintiff when it held that pendent jurisdiction extended to the counterclaim of intervening defendants." (Emphasis in original; footnote omitted.)

See also Wigglesworth v. Teamsters Local 592, 68 F.R.D. 609, 613 (E.D. Va. 1975).

Moreover, the Gross faction seeks to append the counterclaims of Bleich and Donoghue to Gross's antitrust counterclaim. Only Gross signed a restrictive covenant. Only Gross was denied an "employment opportunity." Only Gross asserted the antitrust counterclaim. To permit the unrelated counterclaims of Bleich and Donoghue to be appended to Gross's antitrust claim would be to stretch the pendent jurisdiction doctrine to unreasonable lengths.

The addition of Donoghue as a new party on the counterclaims illustrates the outreach of the pendent jurisdiction argument. Here we have a meritless permissive counterclaim which, by definition, has no relationship to the complaint. To it, the Gross faction seeks to attach elaborate state law counterclaims which are unrelated to the complaint; unrelated to the permissive counterclaim; brought on behalf of one individual who was not a party to the complaint or the permissive counterclaim; brought on behalf of another individual who was not a party to the permissive counterclaim; and brought against 19 "additional defendants" who were not parties to the complaint. Surely, the doctrine of pendent jurisdiction was not intended to permit this kind of bootstrapping. See generally Aldinger v. Howard, 427 U.S. 1, 14-15 (1976).

II

LIABILITY WAS ERRONEOUSLY IMPOSED BELOW

engaged in a civil common law "conspiracy" to injure the Gross faction was unfounded as a matter of law and unsupported by the record. There is no independent tort of "conspiracy" under New York law. In addition, none of the steps found by the District Court to have been taken by Finley, Kumble or the other counterclaim defendants constituted an actionable wrong.

The Gross faction has not answered this argument, set forth in our main brief at pp. 30-52. Instead, it has mischaracterized the District Court's holding below as a finding of a conspiracy to "breach fiduciary duties"; misstated our argument;

and utterly failed to demonstrate that any of the acts which it claims to be wrongful are actionable under New York law.

A. The "Breach of Fiduciary Duties" Argument

The Gross faction's principal argument on the "conspiracy" issue is based on a misreading of the District Court's opinion. The Gross faction argues (Gross Br. 46) that:

"The gravamen of the conspiracy counterclaim was clearly stated as breach of fiduciary duty, and the Trial Court found appellants guilty of carrying out such a conspiracy."

The District Court never made such a finding. It expressly described the wrong upon which it based its decision as "a conspiracy . . . to injure Gross, Bleich and Donoghue in their interests in the Partnership" (527) (footnote omitted).

In its 30-page opinion, the District Court made only one passing reference to "fiduciary duties." The Court found that the partners of the Partnership

"lent themselves to the goals of this conspiracy by affirmatively permitting the Partnership to transfer its assets to the Corporation in violation of Section 98 of the Partnership Law and in violation of their fiduciary duties to Gross, Bleich and Donoghue as other partners." (526)

It is obvious from this quotation that the "conspiracy" found by the District Court was not a conspiracy to breach the partners' fiduciary duties, as the Gross faction now suggests. On the contrary, the District Court held that (a) the nature, purpose and effect of the conspiracy was to deprive members of the Gross faction of their Partnership capital -- not to breach fiduciary duties; and (b) by lending themselves to that conspiracy, the partners (and only the partners) had breached their fiduciary duties to the Gross faction. The District Court held that the partners' breach of fiduciary duties was a consequence of the conspiracy to injure, not the objective of that conspiracy. Moreover, this breach of fiduciary duties did not involve any counterclaim defendants other than the partners, because the partners were the only parties who had a fiduciary duty to the Gross faction.

In addition, there is a serious question whether, on this record, even the partners can be held to have engaged in a breach of fiduciary duties. First, to the extent that this alleged "breach" is based upon the partners' failure to pay Gross his capital interest, it is legally unsupported. At the time of the reorganization, the amount of Gross's capital interest in the Partnership had not been fixed. The determination of the amount of Gross's capital interest required an accounting and such an accounting was Gross's proper -- and exclusive -- remedy against the Partnership. Blattberg v. Weiss, 61 Misc.2d 564, 306 N.Y.S.2d 88 (Sup. Ct. Queens Co. 1969); Dalury v. Rezinas, 183 App. Div. 456, 170 N.Y.S. 1045 (1st Dep't 1918), aff'd, 229 N.Y. 513 (1920). Absent such an accounting and a determination that the Partnership owed Gross a liquidated

sum, the partners did not have a fiduciary obligation to pay Gross any amounts and could not be held liable for the failure to do so.

Second, the essence of a fiduciary relationship is that the beneficiary of that relationship has confidence in and relies upon the fiduciary. The record here plainly demonstrates that the Gross faction did not rely upon the partners in any respect. Thus, when the majority of the partners came to believe that a reorganization was the only hope for survival of the Partnership's business, the Gross faction, holding a different view, retained independent counsel. Throughout the relevant period, the partners and Gross were open adversaries, represented by separate counsel, negotiating at arm's-length, without any pretense of the extension of trust and reliance that characterizes a fiduciary relationship.

Moreover, the partners dealt openly with the Gross faction at all times. A breach of the fiduciary relationship between partners usually involves "'underhand and secret dealing by one of the partners in fraud of the other. . . .'" <u>Dunfee</u> v. <u>Terwilleger</u>, 15 F.2d 523, 524 (9th Cir. 1926). As one New York court stated, "[t] he sum and substance of the principle is that a partner shall not secretly or clandestinely take advantage of his position to better himself at the expense of his associates." <u>Tygart v. Wilson</u>, 39 App. Div. 58, 61, 56 N.Y.S. 827, 828 (3rd Dept. 1899). See also <u>Levine v. Personnel Institute, Inc.</u>, 138 N.Y.S.2d 243 (Sup. Ct. N.Y. Co. 1954), <u>aff'd mem.</u>, 2 App. Div. 2d 964, 158 N.Y.S.2d 740 (1st Dept. 1956).

In <u>Greenfield</u> v. <u>Denner</u>, 23 Misc. 2d 797, 199 N.Y.S.2d 899 (Sup. Ct. N.Y. Co. 1960), the Court refused to find a breach of fiduciary duty on the part of majority stockholders who desired to liquidate their company over the objections of the minority. The Court observed that "[t]he stubborn attitude of plaintiff . . . that this was 'his business' and that he alone could determine its continuance, even to failure, cannot be transformed into a justification for such minority dictating to the majority stockholders," <u>Id</u>. at 802, 199 N.Y.S.2d at 904. Here, the withdrawn partner Gross, through the manipulation of Bleich and Donoghue, sought to obstruct what the remaining partners viewed as the only opportunity for salvaging the business of the Partnership. The partners' open, non-clandestine, opposition to the Gross faction was plainly not a breach of fiduciary duties.

In light of the foregoing analysis, the cases relied upon by the Gross faction in support of their "breach of fiduciary duty" argument (Gross Br. 47-51) are completely beside the point, Meinhard v. Salmon, 249 N.Y. 458 (1928), Duane Jones Co. v. Burke, 306 N.Y. 172 (1954), and Rampell v. Hyster, 3 N.Y.2d 369, 165 N.Y.S.2d 475 (1957). The central theme in all three of these cases was that one party had breached its fiduciary duties to the other party. The decision below was not based on such a finding. Nor could it have been as to any of the counterclaim defendants, other than the partners, since none of these par-

ties, including Finley, Kumble, had any fiduciary relationship with the Gross faction.

B. The "Conspiracy" Argument

The Gross faction devotes five pages of its brief (Gross Br. 57-62) to an argument which is not germane on this appeal: that a civil conspirator may be held liable for the wrongful acts of his co-conspirator. The Gross faction's argument on this point, including its "murder analogy" (Gross Br. 61-62), is superfluous rhetoric.

Our argument is not that Finley, Kumble may only be held liable for the separate torts committed by it. We argue, and the Gross faction concedes, that there is no tort of conspiracy unless the conspiracy is "carried out by the commission of some wrongful overt act" (Gross Br. 58; emphasis in original). Here, we submit, that test has not been met. Thus, this Court need not reach the question of whether and to what extent any wrongful overt acts may be attributed to Finley, Kumble by virtue of the alleged "conspiracy."

C. The "Wrongful Actions" Argument

The Gross faction lists nine allegedly wrongful acts which, it contends, "Judge Owen found were performed in furtherance of the conspiracy" (Gross Br. 53): (1) settlement of the Buckley churning claim; (2) "defamation" of Gross; (3) violation of §98; (4) "forgiveness" of the partners'

indebtedness; (5) rendering a "dishonest opinion letter"; (6) conversion of Gross's "in-kind" securities; (7) bringing "baseless" lawsuits; (8) giving "misinformation" to Peat, Marwick, and (9) destroying Gross's employment opportunity. None of these alleged actions supports the finding of a tortious conspiracy.

(1) "Defamation" of Gross

Gross charges that the counterclaim defendants "defamed" him to the Limited Partners, the Subordinated Lenders and their attorneys in order to push through the reorganization (Gross Br. 53). This alleged element of the "conspiracy" is the figment of a fertile appellate imagination. Defamation was not placed by the Gross faction, was not proved at trial and was not found by the District Court. See the discussion at pp. 45-46, infra. The newly discovered defamation claim has no place in this appeal and should be ignored.

(2) Gross's "Employment Opportunity"

"maliciously destroyed" his "employment opportunity" with
Rafkind & Co. to counter Gross's opposition to the reorganization
(Gross Br. 54). This element of the alleged conspiracy is also
insufficient. The District Court found that the Partnership's
assertion of the non-competition clause in the Partnership
Agreement was completely lawful, and dismissed Gross's counterclaim based on this incident (534; FK Br. 34). This deter-

mination was clearly correct, and Gross's cross-appeal challenging it is meritless. (See Point V, infra.)

(3) The Litigations

A set forth in our main brief (FK Br. 37-43), the "baseless" lawsuits complained of by the Gross faction did not constitute malicious prosecution or abuse of process. The Gross faction expressly concedes this conclusion (Gross Br. 55). Nevertheless, it contends that when "baseless" litigation is an element of a conspiracy, it is actionable even if it does not constitute malicious prosecution, abuse of process or any other tort (Gross Br. 55-57). This argument is contrary to the basic principle — which the Gross faction elsewhere appears to accept (Gross Br. 58) — that a civil "conspiracy" does not give rise to liability unless it, or some act committed pursuant to it, constitutes a recognized tort. If, as Gross concludes, the "baseless" litigations were not tortious, they neither supply the necessary substance to the "conspiracy" nor constitute a separate basis for liability.

The cases cited by the Gross faction are not to the contrary. In Munson Line v. Green, 6 F.R.D. 14 (S.D.N.Y. 1946), appeal dismissed, 165 F.2d 321 (2d Cir. 1948), relied on by the Gross faction, the Court dismissed a claim for malicious prosecution because it failed to allege any special interference with plaintiff's person or property. However, the Court upheld another claim in which canaless litigation was one of a number

of acts which constituted not a conspiracy but the specific, "generally recognized" tort of wrongful interference with another's business (6 F.R.D. at 17). Similarly, in <u>J. J. Theatres</u> v. <u>V.R.O.K. Co.</u>, 96 N.Y.S.2d 271 (Sup. Ct. N.Y. Co. 1950), another case relied upon by the Gross faction, a claim was upheld because it stated a cause of action for the tort of unlawful interference with plaintiff's business. Both of these cases held that a tort other than malicious prosecution was pleaded. Since the "baseless" litigations here were not tortious, they do not advance the Gross faction's argument.

In any event, the holding that the litigations were "baseless" is completely unsupported by the record.

The undisputed facts preclude a finding that the Buckley churning claim was baseless. The claim withstood a pretrial motion for summary judgment (458-59); the District Court determined that there was excessive trading in the Buckley accounts (513); the evidence supporting this claim was sufficient to require the District Court carefully to weigh it before concluding that certain elements necessary to establish the claim had not been proved (513); independent expert testimony supported the claim (A561-590); and independent counsel, the Webster, Sheffield firm, had asserted this claim long before Finley, Kumble's retention by the Partner-

ship (A371-416).* There is no basis on which the District Court could fairly rest a finding that the churning claim was baseless, regardless of the motives with which it was asserted. See Munoz v. City of New York, 18 N.Y.2d 6, 9, 271 N.Y.S.2d 645, 648-49 (1966).

There is also no support in the record for the contention that the "reply counterclaims" asserted against Gross were baseless. (See FK Br. 41-43.) As the Gross faction's brief concedes, the reply counterclaims came from a long list of possible claims against Gross which Ned Frank, a Newburger partner and practicing attorney, had prepared (Gross Br. 31-32). These counterclaims were not asserted

^{*} The Gross faction erroneously suggests that the Webster, Sheffield firm had asserted this claim merely as a "tactical move" (Gross Br. 20-21). The record does not support this suggestion. James Ryan, a partner in Webster, Sheffield, testified that he believed this claim was meritorious (A410).

The Gross faction also points to the fact that Arthur Silverman, the attorney who had been handling the Buckley arbitration for the Partnership, thought the claim had no merit, and that Silverman's opinion was confirmed by an interview he and the Partnership's Director of Compliance had with Charles Jordon (Gross Br. 20-21). This argument overlooks a salient, undisputed fact. Silverman's firm, while representing the Partnership, had also long been counsel to Gross, and until its demise, to Gross & Co. (A1766-1767.) Indeed, in the "objective" interview with Jordon, Silverman asked Gross to sit in with him (A1797). Subsequent to the interview, Silverman became counsel for Bleich and Donoghue in the dispute which ripened into this very litigation and, additionally, Silverman represented Gross in the arbitration brought against Gross by Messrs. Kayne and Sloane. Thus, Silverman's objectivity is highly questionable.

against Gross until after the Gross faction filed its own answer and counterclaims. If, as the Gross faction contends, the whole purpose of the "baseless" litigations was to avoid paying it money, why weren't these counterclaims asserted against Gross at the outset? The Gross faction has no answer to this question and, indeed, concedes that only the six strongest of the many claims gathered by Ned Frank were interposed in this litigation (Gross Br. 32).*

Finally, as elaborated in Kayne's main brief (pp. 32-33), there is no foundation for concluding that the action commenced by Messrs. Kayne and Sloane (without any participation by Finley, Kumble) was "baseless". This assertion is based on the untenable assumption that the Kayne and Sloane action was brought for the purpose of coercing Gross to agree to the reorganization or, if that failed, as a pretext for keeping his capital. The undisputed facts do not support this hypothesis. Kayne and Sloane continued to prosecute their claim, by arbitration, for several years after the reorganization was consummated

^{*} The Gross faction disputes our contention that four of the counterclaims were abandoned because of Ned Frank's death. It points out that Finley, Kumble's opening statement at trial contained promises to prove these claims (Gross Br. 32). This argument proves too much, since all the Gross faction has shown is that the Corporation stood by these claims at trial. A detailed affidavit which Mr. Frank submitted on Gross's pretrial motion for summary judgment demonstrates that he indeed was the person with the most knowledge of these claims (163-181). Later, it became apparent that they could not be proved without additional evidence, and they were abandoned (A4466-68).

(Kayne Br. 32-33). Moreover, the arbitration did not have anything to do with Gross's capital, and thus, by no stretch of the imagination, could it be used as a pretext for "retaining" Gross's capital -- nor was it ever so used.

(4) Settlement of the Buckley Churning Claim

Since the assertion of the Buckley churning claim against Gross was concededly not malicious prosecution or abuse of process, and since the claim was clearly supported by probable cause, it is difficult to see how the settlement in which that claim was obtained was in any way unlawful.

Neither the District Court nor the Gross faction has advanced any basis for such a holding. Thus, whether the settlement was made in "bad faith" or not is irrelevant; such a settlement is not tortious regardless of motive.

In any event, the record does not support the conclusion that the settlement was made in "bad faith". The Gross faction bases its "bad faith" conclusion on the assertion that Persky "seized upon the churning claim immediately, without any investigation regarding its merits" (Gross Br. 24). The facts do not support this contention. The entire Buckley file was reviewed by both Persky and the Partnership's house counsel, Berkowitz (Al088; A899-900). Persky discussed the merits of the churning claim with the Buckleys' attorney at Webster, Sheffield (Al091) who originally asserted the claim

and believed it to be meritorious (A410). Berkowitz testified that he, not Persky, first suggested that Gross & Co. might be liable for churning (A902; E943). Berkowitz testified further that, when the churning claim was assigned, there was no discussion of Gross "being any kind of problem" as far as the reorganization was concerned (A946-947). Apparently, the District Court credited Berkowitz's testimony since it dismissed the counterclaims as they related to him. Clearly, Finley, Kumble, which merely acted as the Partnership's counsel in settling the claim, cannot be held liable for it.

The timing of the settlement further refutes any suggestion of bad motive. The settlement was agreed upon in the beginning of December and was consummated in mid-December, 1970, prior to the date when Bleich and Donognue indicated that they would not consent to the reorganization (E943; E125-129). Indeed, through the end of December, it appeared likely that Bleich and Donoghue would consent (A1645; E154).

The Gross faction urges, as further evidence of bad motive, the fact that the complaint erroneously alleged that Gross personally handled the Buckley accounts (Gross Br. 28-29). As our main brief pointed out, this error had no legal significance (FK Br. 39). The Gross faction's brief asserts that everyone knew that Gross did not handle the accounts and that "[t]here is not one person who Persky might have asked about this matter who could not have set him straight at once" (Gross Br. 28-29). Yet, before the complaint was filed, Persky showed it to the Gross faction's own attorneys and they didn't set him straight (Allo3; Al740-1741).

(5) The Conversion of Gross's "In-Kind" Securities

First, the District Court did not consider this

"conversion" as part of the alleged conspiracy since it held
only some -- not all -- of the alleged conspirators liable
for it: Kayne, Risher, Persky and Finley, Kumble. The "conversion" was a separate claim for relief, a separate tort -not part of the conspiracy. Thus, Finley, Kumble could be held
liable only if it directly participated in the conversion.
Finley, Kumble's alleged participation in the conspiracy is
not a sufficient basis for attributing to it the acts of
others in the separate "conversion" incident. Moreover, since
the District Court treated this "conversion" as a separate
incident, even if actionable, it does not supply the necessary
substance to the conspiracy claim.

It is undisputed that Finley, Kumble's only connection with the alleged conversion was that Persky was sent a carbon copy of a letter from Kayne to Risher in which Kayne suggested that Risher take certain securities and place them in the vault of one of their banks (E848; 532-33).

Thus, there is no factual or legal basis for holding Finley, Kumble liable for this incident.

Second, the premise upon which the District Court based its holding that these warrants were "converted" cannot be sustained. That premise is that title to the warrants "had been lawfully transferred to the partners as an 'in-kind'

distribution of income" (518). The August 24, 1970 letter which evidenced this "distribution" stated simply that certain securities were acquired by the Partnership in 1969 and that the Executive Committee had "determined that [each general partner] own[ed] an interest in these securities . . . equivalent to [his] share as a General Partner in the firm's profits or losses as defined in paragraph 6.3 of the [Partnership Agreement] as of January 1, 1969" (E848). The letter, therefore, merely asserts that the partners had an undivided interest in the warrants as they had in the Partnership's other assets; it says nothing about a "distribution". Nor could it, for Article 6.3 of the Partnership reement provides for the distribution only of net profits (E433-434). It is undisputed that, as of the time of the purported distribution, the Partnership had no net profits (E929). Thus, the letter could not have been intended to make a distribution of the warrants, nor did it make such a distribution. Indeed, any distribution of the warrants to the general partners would have been a clear violation of the Partnership Agreement.

(6) The Violation of § 98

In our main brief, we argued that Gross, as a withdrawn general partner, had no legal rights under § 98 and therefore could not complain of a violation of that statute (FK Br. 52).

See, e.g., Natkin, v. Exchange Nat'l Bank, 342 F.2d 675 (7th Cir.

1965). Section 98 is expressly designed for the protection of limited partners — not withdrawn general partners — and specifies acts which may not be done by general partners "without the written consent or ratification... by all the limited partners." N.Y. Partnership Law § 98 (McKinney 1948). It is illogical to argue that Gross, who had no rights under § 98, was entitled to sue merely because the rights of other persons under that statute may have been violated.

Conceding that his signature was not required for the reorganization to be consummated, Gross argues that § 98 is not a remedial statute but merely one which declares the rights and powers of the partners (Gross Br. 72). The simple answer to this argument is that § 98 does not declare that Gross, as a withdrawn general partner, had any rights or powers.

No case of which we are aware has ever permitted a general partner, let alone a withdrawn general partner, such as Gross, to recover damages for violation of § 98. The only case cited by Gross on this point, Millard v. Newmark & Co., 24 App. Div. 2d 333, 266 N.Y.S.2d 254 (1st Dep't. 1966), dealt neither with § 98 nor the rights of general partners. Indeed, Gross quotes only dictum in that case, since the holding was that limited partners had no statutory authority to maintain a class action on behalf of all limited partners against the general partners and the partnership.

Moreover, the District Court, contrary to Gross's contention, clearly viewed the statute as remedial. The Court specifically stated that § 98 was designed to guarantee the protection of minority interests (530). The minority interests to be protected by the statute are clearly those of limited partners, not withdrawn general partners such as Gross.

(7) The "Forgiveness" of the Partners' Indebtedness
The Gross faction argues that the "forgiveness" of
part of the capital arrears of certain general partners "induced"
the deficit partners to consent to the reorganization, that it
was wrongful for the deficit partners to accept this forgiveness,
and that Finley, Kumble and all of the appellants are liable because of this wrongful act (Gross Br. 69-71).

First, it should be noted that this "forgiveness," which is only significant as it relates to the consummation of the reorganization, is not an independent tort, and the District Court did not treat it as such. Thus, this alleged action cannot give substance to the "conspiracy".

Second, the term "forgiveness of indebtedness" is an erroneous characterization of the undisputed facts. What happened was this: Among the assets to be transferred to the Corporation as part of the reorganization were certain tax refunds expected to be received by the partners in deficit capi-

tal positions. The Corporation attempted to maximize the amount of tax refunds to be assigned to it, and the deficit partners and their attorneys attempted to minimize such amounts. As a member of the Rosenman firm testified, this was simply part of the negotiations (A2191). There was no unilateral "forgiveness" of indebtedness by the Corporation, but an arm's-length exchange of indebtedness for tax refunds.

Additionally, as noted below, p. 49, if the figures of Gross's own accountant had been used to calculate the capital positions of the partners, there could have been no "forgiveness" of indebtedness.

(8) The "Misinformation" to Peat, Marwick

The award of damages to the Gross faction cannot be justified on the ground that the Partnership's balance sheet was "misleading". The Gross faction did not rely on the balance sheet but contested almost every one of its material provisions and opposed the transaction in which it was used. Thus, as far as the Gross faction was concerned, whether information provided to Peat, Marwick was correct is irrelevant and cannot be the basis of liability. The accuracy of that information only bears on the question of damages and, as noted in Point IV, infra, the calculation of damages by Gross's accountant, not that done by Peat, Marwick, was unsupported.

It is the normal procedure for management to supply

financial information to accountants for preparation of financial statements (A4119-20). The accountants do not accept without question figures given to them by management. Rather, they independently examine the information given to them and disagree with that information if it appears unwarranted or in some way erroneous (A4142; A4152). This was the procedure followed here.

(9) The Opinion Letter

The record does not support the Gross faction's assertion that Persky's opinion letter was "knowingly false" (Gross Br. 74-79). On the contrary, the evidence indicates that the opinion was given in good faith. When the opinion was rendered, there was almost no case law construing § 98. What little authority there was revealed that, under certain circumstances, the literal requirements of the statute could be disregarded (A3891-92). The opinion letter clearly indicated that § 98 could be read to reach a different conclusion. Paul Burak, the attorney from the Rosenman firm who was originally supposed to deliver the opinion letter, testified that, given the financial plight of the Partnership, reasonable men could differ as to whether § 98 would be violated (A2176). In light of this uncontradicted evidence, the contention that the opinion letter was "knowingly false" cannot be sustained.

Regardless of the accuracy or propriety of the opinion letter, there is no showing that its issuance con-

stituted any recognized tort. The Gross faction contends that the tort in question is not fraud or deceit, but "in-jurious falsehood" (Gross Br. 77). The cases cited to support this proposition are totally inapposite. In each of those cases, the defendant gave a third party false information concerning the plaintiff which caused the third party to take injurious action against the plaintiff.*

Persky's opinion letter, even if it were a knowingly false statement of the law, concededly contained no false information about the Gross faction. All of the factual information contained in the letter was accurate. Therefore, the rendering of the letter did not constitute the tort of "injurious falsehood."

Finally, the Gross faction contends that, at the time of the closing, none of the parties were contractually bound to go forward with the closing and thus, the absence of the

^{*} In Penn-Ohio Steel Corp. v. Allis Chalmers Mfg. Co., 7 App. Div. 2d 441, 184 N.Y.S.2d 58 (1st Dep't 1959), defendants gave false information concerning the plaintiffs to the Internal Revenue Service, which resulted in the plaintiffs being indicted for income tax evasion. In Felis v. Greenberg, 51 Misc. 2d 441, 273 N.Y.S.2d 288 (Sup. C'. Kings Co. 1966), a doctor knowingly gave false information concerning his patient to an insurance company, which resulted in the insurance company's refusal to pay the patient any disability benefits. In Al Raschid v. News Syndicate Co., 265 N.Y. 1 (1934), it was alleged that the defendant knowingly gave false information concerning the plaintiff to immigration officials, which caused the immigration officials to prosecute, arrest and deport plaintiff.

opinion letter could have prevented the closing from taking place (Gross Br. 76). This argument misconstrues the relevant documentary evidence.

On December 31, 1970, the parties executed a written instrument in which the Partnership agreed to transfer its assets and the Corporation agreed to accept such assets at a closing to be held on a specified date (E1093). Under this Agreement, the opinion letter was a condition precedent solely to the Corporation's obligations to go through with the closing (E1098). Nowhere did the agreement state that it was not a legally binding contract.

Although, on February 11, the parties executed a subsequent document reflecting certain modifications from the December 31 agreement, and attaching certain schedules omitted therefrom, no one attempted, between December 31 and the closing on February 11, to change the provision regarding the opinion letter. At all times — in the December 31 agreement and the February 11 modification — the opinion letter remained a condition precedent solely to the Corporation's obligation to close. Under both contracts, the Corporation could have waived this requirement.

III

LIABILITY WAS ERRONEOUSLY IMPOSED UPON FINLEY, KUMBLE, AS ATTORNEYS

In our main brief, we argued that, regardless of whether any tortious acts had been committed by its clients,

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no liability could be imposed on Finley, Kumble since it acted strictly as counsel (FK Br. 53-59). The Gross faction recognizes that an attorney cannot be held liable for his client's acts unless it is shown "that he did something either tortious in character or beyond the scope of his honorable employment."

Dallas v. Fassnacht, 42 N.Y.S.2d 415, 418 (Sup. Ct. N.Y. Co. 1943) (emphasis added). The Gross faction has failed to show that Finley, Kumble did anything tortious or went beyond its proper role as counsel.

All of the acts performed by Finley, Kumble were the traditional acts which lawyers perform in serving their clients (FK Br. 57-58). Where attorneys are procticing their profession and performing acts which, if performed by another could constitute an actionable wrong, "their profession itself confers a privilege which immunizes them from liability. . . ." D&C

Textile Corp. v. Rudin, 41 Misc.2d 916, 919, 246 N.Y.S.2d 813, 816 (Sup. Ct. N.Y. Co. 1964).

The Gross faction cites <u>Dallas</u> v. <u>Fassnacht</u>, <u>supra</u>, 42 N.Y.S.2d 415 (Sup. Ct. 1943), for the proposition that an attorney can be liable for participating with his client in a wrongful conspiracy. Its reliance on this case is misplaced. In <u>Dallas</u>, the Court dismissed a counterclaim alleging a conspiracy between an attorney and his client to injure the counterc aimant by wrongful acts, including the institution of a lawsuit. While recognizing that an attorney may be held liable

where he does something tortious or beyond the scope of his proper role as counsel, the Court held that the claim before it did not allege any such wrongdoing. Indeed, as to the allegation that the attorney had conspired with his client in maliciously instituting a lawsuit, the Court observed that "[o]rdinarily an attorney in bringing an action is not liable as long as he does not do anything beyond his duties to his client." The court also noted that an attorney acting in good faith on behalf of his client will not be "'liable to the other party for injuries which the latter may sustain from the fact that the action was begun or prosecuted by the attorney's client, either maliciously or without probable cause.'" Id. at 416.

There was ample probable cause for the lawsuits instituted by Finley, Kumble on behalf of its clients in this action. The record cannot support a finding that such actions were baseless. See pages 23-26, supra. Nevertheless, the District Court appears to have found such actions to be "baseless" on the ground that the claims asserted therein were not proven at trial. This is not the law. On the contrary, a lawyer must be privileged to assert any claim on behalf of his client unless it can be shown that the claim was fabricated.

The rule in <u>Dallas</u> necessarily applies, not only to the institution of litigation but also to the other traditional acts which a lawyer performs in serving the interests of his

client, such as negotiating settlements, bargaining with adversaries, giving legal advice and rendering legal opinions. Certainly, the Gross faction may not avoid this rule by means of the bogus charge of "defamation" by Persky (Gross Br. 64). The charge of defamation has no basis in either the record below or the District Court's findings. See the discussion at pp. 45-46, infra.

The Gross faction suggests that Persky's conduct was particularly wrongful since it was directed against limited partners and a withdrawn general partner of the Newburger Partnership, implying that somehow Persky owed some special duty to the Gross faction (Gross Br. 65). However, Finley, Kumble never represented any member of the Gross faction; surely, no one in the Gross faction ever viewed Finley, Kumble as his lawyers. With one exception, the acts of which the Gross faction complains were acts performed while Finley, Kumble was representing the new Corporation and its promoters. The settlement of the churning claim by, inter alia, accepting an assignment of the claim against Gross & Co. was the single allegedly wrongful act performed by Persky in his capacity as counsel to the Partnership. Under such circumstances, clearly Persky's duty was to the Partnership, not to any individual partners therein. The assignment benefitted the Partnership; that it did not benefit Gross is an inadequate basis for criticizing Persky's actions.

And contrary to the Gross faction's contentions that Persky fomented claims against Gross and advised the other parties to the reorganization of the existence of such claims (Cross Br. 31), the impetus for asserting any claims against Gross came from Finley, Kumble's clients. As early as September, 1970, when Filley, Kumble's representation of the Partnership was still limited to certain real estate matters (Al078-79), the Newburger partners were advising Persky of various wrongdoings on Gross's part (E786; A2031). As in Dallas v. Fassnacht, supra, 42 N.Y.S.2d 415 (Sup. Ct. 1943), even if the client had a wrongful motive in asserting that there were claims against Gross, that wrongful motive cannot be imputed to Finley, Kumble. Indeed, Finley, Kumble did not even accept such information from its client at face value. Rather, it asked the client to refine the information, and when the client did so, Finley, Kumble further refined it and asserted only the six strongest claims against Gross as "reply counterclaims" in this litigation. See the discussion at pp. 24-25, supra.

The Gross faction attempts to show that Persky had a personal interest in his client's transactions other than the usual lawyer's motivation to obtain a good client (Gross Br. 41-43). Many of the factual allegations contained therein are mischaracterizations of the record and improperly described as findings of the District Court. For example, the Gross faction suggests that Persky's receipt of stock in the new Corporation

demonstrates his personal interest in the transactions (Gross Br. 42). The sole evidence on this point is that after the reorganization was consummated, the Corporation asked Finley, Kumble to accept some stock as part payment for legal fees incurred (All76). Prior to or contemporaneously with the reorganization, there was no discussion of or intent that Finley, Kumble would receive any stock in the Corporation (All76-77). The District Court made only one finding on the subject of Persky's "interest": that Persky desired to obtain fees and a lucrative new client (532). It is on the basis of that finding that the Court's extension of liability to Finley, Kumble must be tested. But every lawyer, in every transaction in which he represents a client, has the interest of maintaining or extending the client relationship and being paid a fee. This is simply not a "personal interest" of the sort which would vitiate Finley, Kumble's status as counsel.*

^{*} By citing and reiterating subsequent criminal convictions of Persky, the Gross faction is making irrelevant appeals to prejudice which, regardless of their impact below, have nothing to do with this appeal. At this juncture, it bears mentioning that Finley, Kumble was not brought into this case until nine months after the Gross faction first asserted its counterclaims (31). The Corporation was beginning to flounder financially, and the original counterclaim defendants no longer appeared to offer the possibilities of monetary recovery which the Gross faction was seeking. As this Court has recently stated, "As so often happens in situations of this nature, the victim is forced to seek financial solace from other than the [wrongdoer]." Miller v. New York Produce Exchange, Nos. 75-5024, 76-5002, slip op. 1777 (2d Cir. Feb. 14, 1977).

DAMAGES WERE ERRONEOUSLY AWARDED BELOW

A. The Conversion of Gross's "In-Kind" Securities

Judge Owen awarded damages on the third counterclaim, which alleged conversion of Gross's "in-kind" securities. He did so despite Judge Ward's pre-trial ruling that (a) the Court lacked jurisdiction over that counterclaim, and therefore (b) it was available only as a set-off to the churning claim asserted in the complaint (365 F. Supp. at 1367). And he did so notwithstanding his own expressed determination to follow Judge Ward's ruling (514).

Attempting rationalize the trial court's volte
face, the Gross faction repeats Judge Owen's explanation: the issue was fully litigated and the pleadings were conformed to the proof (Gross Br. 104-105 .* But in the absence of juris-diction, the issue could be -- and was -- litigated only as a defensive set-off, not as a basis for affirmative relief.

Limitations on a federal court's subject matter jurisdiction cannot be overridden by litigating a claim -- no matter how fully. Nor can jurisdiction be expanded by the simple expedient of amending the pleadings to conform to the proof.

^{*} The only other rationale offered by the District Court was that the conversion was "arguably pleaded in paragraph 44 of the amended answer" (536). The Gross faction, apparently conceding that this argument has no merit, abandons it.

This is a jurisdictional issue. It has nothing to do with technical rules of pleading. Neither the District Court nor the Gross faction has met the jurisdictional issue. For just as Judge Owen offered no grounds for holding the third counterclaim to be compulsory, so the Gross faction makes no effort to demonstrate that this counterclaim "arises out of the same transaction or occurrence" as the claim asserted in the complaint. Rather than relating this counterclaim to the claims in the complaint, the Gross faction attempts to relate it to its other counterclaims. Such an analysis has no relevance to a determination of whether a non-federal, non-diverse counterclaim is compulsory and thus maintainable in federal court.

Avoiding this basic issue, the Gross faction concentrates on defending the propriety of Judge Owen's departure from the law of the case in reversing Judge Ward. Yet it is well settled that only in unusual circumstances will a court reconsider a prior ruling in the same case. As the Supreme Court has stated:

"While power rests in a federal court that passes an order or decision to change its position on a subsequent review in the same cause, orderly judicial action, except in unusual circumstances, requires it to refuse to permit the relitigation of matters or issues previously determined on a former review." Insurance Group Comm. v. Denver & R.G.W.R.R., 329 U.S. 607, 612 (1947) (footnote omitted).

To the same effect is Zdanok v. Glidden Co. Durkee
Famous Foods Div., 327 F.2d 944, 952-53 (2d Cir.), cert. denied,

377 U.S. 934 (1964), where this Court refused to reconsider a prior ruling notwithstanding a persuasive, intervening contrary decision by another Circuit. This Court stated:

"This is precisely the situation in which 'the law of the case' is decisive; in Judge Magruder's words, 'mere doubt on our part is not enough to open up the point for full reconsideration.' White v. Higgins, 116 F.2d 312, 317 (1st Cir. 1940)."

". . . [W] here litigants have once battled for the court's decision, they should neither be required, nor without good reason permitted, to battle for it again."

Here the litigants battled for and were entitled to rely on Judge Ward's decision that the counterclaim was available only as a set-off. Since Finley, Kumble was not a plaintiff on the churning claim, its interest in defending against a counterclaim available only as set-off was, at best, attenuated. Judge Owen did not decide that affirmative relief was available on this counterclaim until after trial. Thus, his decision to grant affirmative relief was not only erroneous, as a matter of law, but also highly prejudicial to Finley, Kumble.

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As a coda to the argument that the law of the case is not binding, it is urged that there is even greater reason to reconsider a prior decision when jurisdiction is at stake (Gross Br. 105). This is a curious distortion of the fundamental principle that a court can at any time dismiss an action or claim for lack of jurisdiction. It is that prop-

osition, and only that proposition, that is supported by the cases cited at p. 105 of the Gross faction's brief. There is no support for the opposite result argued here: that jurisdiction can be exercised after a determination has been made that jurisdiction is lacking. See Petersen v. Federated Dev. Co., 416 F. Supply 466 (S.D.N.Y. 1976).

B. Punitive Damages

The District Court awarded punitive damages of \$50,000. In our main brief, we argued that this award was impermissible under the governing New York law set forth in <u>Walker v. Sheldon</u>, 10 N.Y.2d 401, 223 N.Y.S.2d 488 (1961) and its progeny (FK Br. 60-65).

The Gross faction concedes that these precedents are controlling, but nevertheless contends that punitive damages were justified because the counterclaim defendants' conduct was particularly outrageous (Gross Br. 106-07). That is a non-sequitur. The governing cases do not turn on whether the conduct of a defendant is outrageous. Rather, they turn on whether the wrongful conduct is "aimed at the public generally." Walker v. Sheldon, supra, 10 N.Y.2d at 405, 223 N.Y.S.2d 491; see also James v. Powell, 19 N.Y.2d 249, 279 N.Y.S.2d 10 (1967).

The New York courts have uniformly held that, even where conduct is wilfull and "violate[s] elementary standards of morality," punitive damages are not available if "no public right is involved and the underlying private wrong is

v. Neptune Meter Co., 30 App. Div. 2d 117, 118-19, 290 N.Y.S.2d 333, 335 (1st Dep't 1968); see Koufakis v. Carvel, 425 F.2d 892, 907-08 (2d Cir. 1970). Consequently, there is no legal basis -- none -- for the principal argument asserted in support of the punitive damage award.

The Gross faction offers two other justifications for punitive damages. Both are meritless.

First, it is suggested that this is really a "defamation" case and that punitive damages are available in defamation actions (Gross Br. 107-09). This is a misreading of the record and the decision below. Defamation was neither pleaded by the Gross faction, nor found by the District Court.

Defamation was never alleged in the extensive pleadings below. The elements of defamation were never proved in the voluminous proceedings below. The theory of defamation was never accepted in the detailed opinion below. It is settled law that an action for defamation must be dismissed if the complaint "fails to set forth the particular words . . . alleged to be libelous." Schwartz v. Andrews, 50 A.D.2d 1057, 376 N.Y.S.2d 722 (4th Dep't 1975). Similarly, a defamation action must fail if the complaint does not "set forth the time, manner and persons to whom the libelous publication was made. ..." Id. Accord, Seltzer v. Fields, 20 App. Div.2d 60, 63-64 (1st Dep't 1963), aff'd, 14 N.Y.2d 624, 249 N.Y.S.2d

174 (1964); Laiken v. American Bank & Trust Co., 34 App. Div.
2d 514, 308 N.Y.S.2d 111 (1st Dep't 1970). Here, one can
scrutinize the pleadings forever without finding a hint of
these or other necessary elements of a defamation claim, much
less a prayer for damages -- punitive or otherwise -- for
defamation. Similarly, one can pore over the District Court's
opinion without finding a trace of a conclusion that defamation
was committed.

Never having alleged defamation, the Gross faction understandably did not appeal from the District Court's failure to find it. The retroactive defamation claim is not before this Court, just as it was never before the District Court.

Second, it is suggested that the controlling New York law on punitive damages is "not necessarily applicable" and that some "inherent" federal law should govern (Gross Br. 109). The Gross faction cites no authority for this remarkable theory, and there is none. See Koufakis v. Carvel, 425 F.2d 892, 905 (2d Cir. 1970) (New York law governs).

C. Gross's Capital Interest

Our main brief argued that the only proper method for determining Gross's capital interest was an accounting. By wholesale acceptance of the Lauterbach testimony -- with its inconsistent theories and clear errors -- the District Court failed to conduct a proper accounting (FK Br. 70).

The thrust of our argument was that, even if Lauterbach were the sole witness on this issue, undisputed facts demonstrated that there were errors and inconsistencies in his computation. Rather than addressing these defects, the Gross brief attempts to discredit witnesses on whom we did not rely and to create non-existent issues of facts.

Most significantly, the Gross brief attempts to walk away from the undisputed fact that Gross was chargeable with a percentage of Partnership losses for the entire 1970 calendar year. Specifically, he was chargeable with 14.21892 percent of 1970 operating losses (E442; E871-76). This was never disputed below. The Partnership Agreement, which governs this matter and as to whose contents there can be no dispute, provides that a withdrawn partner is chargeable with a percentage of losses for the entire calendar year (E442). Gross himself asserted that his distributive share of losses for the entire year was 14.21892 percent (E871-76). So did Lauterbach (E871-76). So did Gross's post trial brief (at pp. 127-28).

Notwithstanding this undisputed fact and his own testimony, Lauterbach excluded from his computation certain write-offs and losses incurred after Gross withdrew but within calendar year 1970. That is the kind of inconsistency, on the face of Lauterbach's own testimony, to which we pointed.

Unable to rationalize this inconsistency, the Gross brief compounds it by arguing that a "withdrawn partner is to share profits or losses up to the date of withdrawal . . . which

in Mr. Gross' case was September 30, 1970" (Gross Br. 111).

The premise of Gross's argument in this Court is that September 30, 1970 is the cut-off date, and that profits or losses after that date are not chargeable to him. That premise, and the Lauterbach computation which shares it, should be rejected not because it is inconsistent with more credible testimony on the other side,* but because it is inconsistent with Lauterbach's own testimony, Gross's own testimony, and Gross's own post-trial brief.

This fundamental error pervades the answering brief and the Lauterbach testimony. The Gross faction concedes, for example, that part of the Atlas realty settlement was paid in 1970 (Gross Br. 115). Lauterbach excluded even the 1970 portion of the payment because it was paid in November — after Gross withdrew (Id.). Based on the undisputed fact that Gross was chargeable with 14.21892 percent of the losses for the entire calendar year, it is irrelevant whether the Atlas payment was made in January, 1970 or November, 1970.

^{*} There was, in fact, abundant credible testimony on the other side which the District Court did not reject but simply ignored (See Al687-1731; A4196-4258). The Gross brief compounds this error by suggesting that the District Court found that the Gross faction would have been paid in full had there been a liquidation of the Partnership rather than a reorganization (Gross Br. 82). The District Court never made such a finding, and could not have, since the sole evidence on this point was to the contrary. William Ragusin, an expert on brokerage company liquidations, testified that there would have been no funds to pay the Gross faction if there had been a liquidation (A4203). His testimony was uncontradicted.

As a further illustration of Lauterbach's inconsistencies, our main brief noted that if Lauterbach's calculation of 1970 operating losses had been used in the financial statement of the Partnership, the capital account of every general partner would have been increased and there would have been no "forgiveness" of indebtedness (FK Br. 74). Gross replies that total Partnership losses can be determined differently than the share of loss of a particular withdrawn partner (Gross Br. 115). That is not responsive. The fact is that Lauterbach himself applied his calculation to t e Partnership's total losses. The schedule which Lauterbach prepared reduced not only Gross's portion of operating losses, but also the operating losses for the Partnership as a whole -- from the Peat, Marwick figure of \$3,017,078 to \$1,551,709 (E873). Thus, the fact remains that if the Partnership had used Lauterbach's computation of \$1,551,709 as 1970 operating losses, the capital positions of those partners who were in deficit would have improved to the point where there would have been no "forgiveness" of indebtedness.*

^{*} Additionally, Gross's suggestion that Lauterbach's computations can be used only for determining the capital account of one partner, and only one partner, ignores the fundamental nature of a partnership accounting. By definition, a partnership accounting is a "full accounting" in which a "balance [is] struck" among all the partners. Dalury v. Rezinas, 183 App. Div. 456, 460, 170 N.Y.S. 1045, 1049 (1st Dep't 1918), aff'd, 229 N.Y. 513 (1920). Thus, if Lauterbach's computation were meant to represent an accounting, those computations would have to be applied to the Partnership as a whole in order to constitute the "full" accounting which is required. The absence of a full accounting here requires the setting aside of the District Court's award.

One final point: Gross does not dispute the fact that, as of the time of the trial, not one penny of the \$494,156 worth of estimated tax refunds, which Lauterbach subtracted from 1970 operating losses, had yet been recovered. Clearly, it was error to treat this contingent item as an asset in the Partnership's financial statement. Gross answers by arguing that doubts on the amount of damages should be resolved in Gross's favor (Gross Br. 117).* This ignores the obvious point that all doubts as to Gross's capital account could have been eliminated by conducting a proper accounting. The failure of the District Court to conduct such an accounting requires the setting aside of the District Court's award.

V

THE "EMPLOYMENT OPPORTUNITY" COUNTER-CLAIMS WERE PROPERLY DISMISSED BELOW

The cross appeal, asserted only on behalf of Gross, sets forth four novel and unprecedented theories of liability,

^{*} Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251 (1946), the case cited by the Gross faction to support this proposition, is not on point. That case involved the use of an unlawful motion picture distribution system against plaintiff where the proper measure of damages was lost earnings. Reversing the Seventh Circuit's holding that evidence of damage was insufficient for submission to the jury, the Supreme Court ruled that inability to reach a precise calculation of damage, where that inability was caused by defendants' own wrongful conduct, should not preclude an award of damages. In the instant case, the issue is not whether the amount of Gross's capital account was unascertainable, but what the proper method is for ascertaining that amount.

all based on the Partnership's refusal to waive a restrictive covenant contained in the Partnership Agreement. None of these theories was persuasive below. Moreover, the District Court never found, nor does Gross even contend, that Finley, Kumble participated in any way in asserting the covenant in question.

The facts underlying this matter are simple. In the latter part of January, 1971, Rafkind & Co. sent a letter to the Partnership requesting clearance to employ Gross as a registered representative (E852); in such a position, he would have been in competition with the Partnership. Berkowitz, house counsel to the Partnership, responded by stating that Gross, as a signatory of the Partnership Agreement, was subject to a covenant not to compete contained in that Agreement (E853). Rafkind & Co. thereafter decided not to employ Gross.

this issue there any hint that Persky or Finley, Kumble played any role whatsoever in this matter. Nor did the District Court make any such finding. The Court found only the "New Team" responsible for the assertion of the covenant, and the New Team was never defined to include Persky or Finley, Kumble (517; 521).

The covenant in question, by its very terms, expired on December 31, 1971 (E438; E415). Thus, from the time Raf-kind & Co. first requested clearance from the Partnership,

the covenant had a life of less than a year. *

The District Court concluded that the New Team had a legal right to assert the non-competition clause, and entered judgment dismissing the claim (521). That portion of the judgment below should be affirmed.

A. The Federal Antitrust Claim is Frivolous

Gross, in effect, concedes that the federal antitrust laws have never been used to support a claim for damages by a former employee or partner subject to a restrictive covenant (Gross Br. 125). Yet he asks this Court to ignore this precedent, including its own prior decisions.

In <u>Bradford</u> v. <u>New York Times Company</u>, 501 F.2d 51 (2d Cir. 1974), this Court refused to find that an employee's covenant not to compete was violative of Section 1 of the Sherman Act. In so ruling, the Court observed:

"Not only has the appellant failed to supply us with any case holding an employee restrictive covenant to be a per se violation, but no court applying the rule of reason has ever held such a contract violative of section 1 of the Sherman Act." Id. at 59.

^{*} Inexplicably, Gross claims damages for a period of time well beyond the expiration date of the covenant (See Gross Br. 133). Gross's fanciful computation of damages is discussed more fully at p. 59, infra.

Similarly, in <u>Capital Temporaries</u>, <u>Inc.</u> v. <u>Olsten</u>, 506 F.2d 658, 666 (2d Cir. 1974), this Court noted that "restrictive covenants". . . do not rise to the status of Sherman Act violations. . . "

Even if federal antitrust law could encompass damage actions based on simple employee or partner covenants, the law is clear that such covenants are valid if they are reasonable.

Bradford v. New York Times Company, supra, 501 F.2d at 59-60; see United States v. Empire Gas Corp., 537 F.2d 296, 307 (8th Cir. 1976), petition for cert. filed, 45 U.S.L.W. 343 (U.S. Nov. 23, 1976) (No. 76-726). Gross does not dispute this proposition; his argument is that the covenant was unreasonable because it was enforced for non-economic motives. Yet, the reasonableness of such a covenant is determined on the basis of its provisions when executed, not the motives when enforced. The test is reasonableness in terms of duration and geographic limits, not in terms of motive.

In <u>Frackowiak</u> v. <u>Farmers Ins. Co.</u>, 411 F.Supp. 1309 (D. Kans. 1976), one of the cases principally relied upon by Gross, the Court articulated this definition of reasonableness:

"Numerous courts have recognized the general rule that agreements not to compete, entered into in conjunction with the termination of employment or the sale of a business, and not offend the federal antitrust provisions if they are reasonable in duration and geographical limitation." Id. at 1318.

Citing <u>Bradford</u>, the Court also observed that no court had ever held such a contract to be violative of Section 1 of the Sherman Act.

The covenant contained in the Partnership Agreement expired at the end of 1971 (E438; E415). The Partnership Agreement was signed in February, 1970 (E412). Thus, the longest the covenant could possibly run would be less than two years. From the date of Gross's withdrawal from the Partnership — September 30, 1970 — the covenant would be in effect for fifteen months. From the date that Rafkind & Co. first requested clearance of Gross from the Partnership, the covenant had a remaining life of less than one year. While there were no geographical limits contained in the covenant, the very brevity of its duration mandates the conclusion that it was reasonable. In Bradford, the covenant in question was of ten years duration. 501 F.2d at 58. In Frackowiak, the covenant in question was of three years duration. 411 F. Supp. at 1314. Both were upheld as reasonable.

Nowhere in Gross's brief is there an attempt to analyze the reasonableness of the covenant by the standards set forth by the courts. Apparently conceding that the covenant itself was reasonable when executed, Gross contends that it became unreasonable because of the rationale for the refusal to waive it. The District Court found that the New Team asserted the covenant as leverage in the negotiations with Gross and that "[i]t was suggested to Gross that if he went along with [the reorganization], they would free him to engage in trading activites with Rafkind" (521). The suggestion that such use of a reasonable covenant constitutes a violation of

the antitrust laws is unprecedented. The antitrust laws do not prohibit even "unreasonable" bargaining under such circumstances.

There was no finding made, or evidence offered, of the anticompetitive purpose or effect that is necessary to establish a cause of action under the antitrust laws. See Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 97 S. Ct. 690, 697-98 (1977). Times Picayune Publishing Co. v. United States, 345 U.S. 594, 614 (1953); see also, GAF Corp., v. Circle Floor Co., 463 F.2d 752 (2d Cir. 1972), cert. dismissed, 413 U.S. 901 (1973). Nor was there even an allegation of any anticompetitive scheme.

In sum, the antitrust counterclaim is baseless.

Indeed, given the absence of any precedent for such a theory and this Court's decision in Bradford v. New York Times, supra, rejecting such a theory, the antitrust counterclaim is not a substantial federal claim and is an inappropriate basis for pendent jurisdiction over Gross's other counterclaims.*

B. Gross's Miscellaneous Theories are Meritless

Gross argues that the refusal to waive the restrictive covenant violated his rights under § 340 of the New York

^{*} See the discussion at pp. 12-13, supra.

General Business Law.* But: (1) there is no jurisdiction over this claim; (2) there was no violation of § 340 and (3) § 340 adds nothing to Gross's federal antitrust claim.

Gross's eighth counterclaim alleged that he was damaged, under common law, by the assertion of the restrictive covenant. At the outset, it should be noted that the eighth counterclaim did not allege a violation of § 340 of the New York General Business Law or of any other state antitrust law. Thus, Gross never pleaded the violation of law for which he is now seeking relief.

Even if the eighth counterclaim could be construed as encompassing such a claim, the District Court properly

^{*} Section 340 provides in pertinent part:

[&]quot;1. Every contract, agreement, arrangement or combination whereby

A monoply in the conduct of any business, trade or commerce or in the furnishing of any service in this state, is or may be established or maintained, or whereby

Competition or the free exercise of any activity in the conduct of any business, trade or commerce or in the furnishing of any service in this state is or may be restrained or whereby

For the purpose of establishing or maintaining any such monopoly or unlawfully interfering with the free exercise of any activity in the control of any business, trade or commerce or in the inching of any service in this state any business, trade or commerce or the furnishing of any service is or may be restrained, is hereby declared to be against public policy, illegal and void." (McKinney 1968).

declined to exercise jurisdiction over it. It surely was not a compulsory counterclaim, for there was not the slightest connection between enforcement of the restrictive covenant and the churning claim alleged in the complaint. Nor did the District Court err in not invoking pendent jurisdiction over this claim. As stated in United Mine Workers v. Gibbs, 383 U.S. 715 (1966), pendent jurisdiction is a discretionary doctrine. In Gibbs, the Court held that the federal courts have the "power" to exercise pendent jurisdiction, if the state and federal claims derive from a common nucleus of operative fact. 383 U.S. at 725. The Court went on to hold that "[t]hat power need not be exercised in every case in which it is found to exist. It has consistently been recognized that pendent jurisdiction is a doctrine of discretion, not of plaintiff's right." 383 U.S. at 726. Given the posture of this case, where a litigant was attempting to pend permissive state counterclaims to a federal counterclaim which itself was only permissive, it could not have been improper to decline to exercise pendent jurisdiction. the discussion at pp. 10-15, supra.

Turning to the merits of Gross's state antitrust claim: Gross concedes that the state law is the same as the federal law. As with the federal law, assertion of an employee or partner covenant not to compete has never been held to support a claim for damages by the "restricted" employee or partner. Moreover, in enforcement proceedings

brought by employers, such covenants are upheld as long as they are reasonable. Riccardi v. Modern Silver Linen Supply Co., 45 App. Div. 2d 191, 196-97, 356 N.Y.S.2d 872, 878-79 (1st Dep't 1974), aff'd, 36 N.Y.2d 945, 373 N.Y.S.2d 551 (1975). The Gross brief concedes that the standards for determining reasonableness are the same under state and federal law, and as set forth above, the covenant contained in the Partnership Agreement was reasonable.

Gross asserts two additional theories to support his cross appeal.

First, he contends that the District Court should have awarded him additional damages based on the assertion of the restrictive covenant, under the Gross faction's conspiracy counterclaim (Gross Br. 138).

But the sole alleged purpose and effect of the "conspiracy" was to deprive the Gross faction of its capital interests in the Partnership (45-47). Even if the assertion of the non-competition clause were part of that conspiracy, the members of the Gross faction have already been awarded the entire amount of their capital interests. No further damages could have resulted from the conspiracy, and none can now be awarded. The argument that such an additional award should be made is simply a reiteration of the argument that one who is restricted by a covenant not to compete has a claim for damages. As set forth above, there is no support for that argument.

It bears mentioning here that Gross's contentions as to the extent of his damages on his lost "employment opportunity" claim are totally speculative and overstated. Rafkind & Co. had requested "clearance" of Gross to hire him as a "registered representative" (E852). To suggest, as Gross does (Gross Br. 133), that he would have profited by more than \$120,000 per year from such employment, and that he would have obtained a return of almost 100 percent per year on capital by trading during such employment, is not only speculative but fanciful. Additionally, the restrictive covenant expired at the end of 1971; yet Gross also claims damages for the entire year of 1972 (Gross Br. 133).*

Second, Gross argues that the assertion of the restrictive covenant constituted prima facie tort (Gross Br. 139).

However, Gross never pleaded or proved such a cause of action. Presumably Gross would read such a plea into the eighth counterclaim (the only counterclaim of conceivable relevance), but the District Court had no jurisdiction over the eighth counterclaim. See the discussion at pp. 56-57, supra.

^{*} In his pleadings, Gross requested a judgment in the amount of \$900,000 for this counterclaim (54). Accepting his treble damage theory, Gross's pleadings alleged damages of several hundred thousand dollars more than even the speculative amount he now alleges in his brief. Gross has thus committed the same "wrong" which he accuses Finley, Kumble of committing: inflating the ad damnum clause in a complaint (see FK Br. 39-40).

resort, and such is the case here. New York law is clear that an action in prima facie tort will lie only where the defendant acted with the "sole motivation of ill will and malice." Cummings v. Kaminski, 56 Misc. 2d 784, 786, 290 N.Y.S.2d 408, 411 (Sup. Ct. Kings Co. 1968) (emphasis added). Similarly, in Benton v. Kennedy-Van Saun Mfg. Corp., 2 App. Div. 2d 27, 152 N.Y.S.2d 955 (1st Dep't 1956), an action for prima facie tort was precluded since defendant's motive was, in part, personal gain, "even though the means employed might be of questionable morality and ethical validity." Id. at 29, 152 N.Y.S.2d at 958.

Here, the District Court found that the restrictive covenant was used as a bargaining device to reach an accommodation with Gross (521). Clearly the motive here was economic gain. Indeed the Court concluded that the motive of economic gain was central to all the actions of the New Team (517).

Additionally, in all of the cases cited by Gross*

(Gross Br. 139), the defendant took affirmative and extraor-

^{*} Gross relies primarly on a 75 year old Illinois case -London Guarantee Co. v. Horn, 206 Ill. 493, 69 N.E. 526
(1903) -- which has absolutely no application in this jurisdiction. In any event, the court in that case predicated
liability on interference with contract not prima facie
tort. Moreover, the court held that the defendant caused
plaintiffs injury by threatening to do acts which it knew
it had no right to do. In the instant case the Partnership
had every right to assert the restrictive covenant.

dinary action against the plaintiff. Here a concededly valid contract right, which the Partnership simply refused to waive, is claimed to constitute a prima facie tort. The failure to relinquish one's legal rights upon request cannot state a cause of action.

Conclusion

For the reasons set forth above and in Finley, Kumble's main brief, that part of the judgment below which granted relief to defendants against Finley, Kumble should be reversed and the counterclaims asserted against Finley, Kumble dismissed. Alternatively, the District Court's award of punitive damages and of damages on defendants' third counterclaim should be set aside and this action remanded to the District Court for a proper accounting of Gross's capital interest. That portion of the judgment from which Gross has cross appealed should be affirmed.

Dated: New York, New York April 5, 1977

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NEWBURGER, LOEB & CO., INC.,
as Assignee of Claims of David Buckley
and Mary Buckley,

Plaintiff - Appellant - : Docket No. 76-7476
Cross-Appellee,

-against
CHARLES GROSS, MABEL BLEICH,
GROSS & CO. and JEANNE DONOGHUE,

Defendants - Appellees - :

Cross-Appellants, NEWBURGER, LOEB & CO., et al.,

> Additional Defendants on Counterclaims - Appellants -Cross-Appellees.

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

RICHARD KURNIT, being duly sworn, deposes and says:

I am over twenty-one years of age, not a party to
this action, and reside at 124 West 93rd Street, New York,
New York.

On April 5, 1977, I served two copies of the attached Reply and Answering Brief upon all Counsel of Record in the above matter by depositing true copies of the same in a postpaid, properly addressed wrapper in an official depository under the exclusive care and custody of the United States Post Office Department within the State of New York.

Richard Kurnit

Sworn to before me this 5th day of April, 1977

Notary Public

CLARA A. LAURO
Notary Public, State of New York
No. 30-7443100
Qualified in Nassau County
Certificate filed in New York County
Commission Express March 20, 1278

